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Preliminary Injunction Creates Uncertain Fate For Overtime Regulations

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On November 22, 2016, a United States District Court issued a nationwide preliminary injunction preventing the Department of Labor from implementing and enforcing its new overtime regulations. Those regulations, which would have more than doubled the minimum salary level required to exempt executive, administrative, professional, and salaried computer professional employees from eligibility for overtime, would otherwise have gone into effect on December 1, 2016. The regulations are more fully described in Pillsbury's May 19, 2016 Client Alert. Although a preliminary injunction is a temporary court order, the ruling may foreclose the overtime regulations from ever taking effect, in light of the timing of the preliminary injunction and the upcoming change of Presidential administration.

The preliminary injunction was issued in *State of Nevada, et al., v. U.S. Dep't of Labor*, in response to an emergency motion brought by twenty-one States in the U.S. District Court for the Eastern District of Texas. Among other arguments, the plaintiffs contend that the Department of Labor (DOL) exceeded the authority delegated to it by Congress to interpret the scope of the "white collar" exemptions under the Fair Labor Standards Act of 1938, as amended (FLSA). The relevant statutory provision of the FLSA exempts from overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity" (the EAP exemptions). The FLSA allows the DOL to "defin[e] and delimi[t]" the EAP exemptions "from time to time."

The DOL's regulations on the EAP exemptions have changed over the decades. Currently, an employee may be classified as exempt under the EAP exemptions if each of three tests is satisfied:

- The salary-basis test: The employee must be paid on a salary basis (a requirement since 1940);
- The duties test: The employee's position must meet specific "white collar" duties tests (a requirement since 1938); and

- The salary-level test: The employee must be guaranteed a salary at or above a specific minimum salary level (a requirement since 1949).

Since 2004, the minimum salary level has been set at $455/week or $23,660 annually. Under the new regulations, the minimum level would jump to $913/week or $47,476 annually, with automatic increases every three years, starting on January 1, 2020, set to the 40th percentile of average wages for full-time salaried employees in the lowest-wage Census region.

In issuing the injunction, the Texas district court held that the salary-level test exceeds the DOL's authority to define and delimit the EAP exemptions. The court's ruling surprised most observers, in part because the salary-level test has been part of the DOL's regulations for over 65 years and because the Supreme Court had upheld the DOL's authority to apply its salary-basis regulations in a 1997 decision (*Auer v. Robbins*). In a likely nod to the long history of the salary-level test, the court explained in a footnote to its opinion that it was "not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department's Final Rule."

Despite this footnote, the basis for the court's conclusion that the new salary-level test exceeds the DOL's authority is largely based on reasoning that might also apply to the current salary-level test. Explaining that an agency's regulations interpreting a statute only merit deference "if Congress has not unambiguously expressed its intent regarding the precise question at issue," the court determined that "the plain meanings together with the statute" make clear that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level.... [N]othing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level." The opinion suggests, however, that regulations that impose a low minimum salary level might not conflict with Congressional intent, but that "this significant increase to the salary level creates essentially a de facto salary-only test…. The Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test."

The preliminary injunction creates significant uncertainty about the fate of the new overtime regulations. Further developments in court, in Congress, or in the Trump Administration give rise to a variety of possible scenarios.

The Obama Administration has the right to immediately appeal the preliminary injunction to the Fifth Circuit Court of Appeals, under 28 U.S. Code Section 1292, and may seek an expedited appeal under that court's administrative rules. It is possible that the Court of Appeals could reverse the district court, allowing the salary level increase to go into effect before the last day of the Obama Administration. Unless the Court of Appeals grants an expedited appeal and rules before January 20, 2017, however, the Trump Administration could choose to drop the appeal. In that event, the preliminary injunction would stand, and the district court case would likely eventually result in a permanent injunction that the Trump Administration would not appeal.

The preliminary injunction also provides time for possible Congressional action. Under the Congressional Review Act (CRA), Congress has a deadline of 60 "days-of-continuous-session" from the date a final rule is submitted to Congress during which any member may submit a joint resolution disapproving the rule. The 60-session-day clock resets at the beginning of each Congress for any regulations published during the 60 session days prior to the final day of congressional adjournment. If the House recesses by December 9, 2016 (within the 60-session-day deadline), the new Republican Congress could issue a joint resolution of disapproval under the CRA that President Trump might sign. In that event, the CRA provides that the "rule shall not take effect (or continue)." Although this scenario would also have been possible without the preliminary injunction, there would have been little political appetite to repeal the rule if the new

regulations had gone into effect on December 1, and employers had already modified their employees' compensation, because most members of Congress would not want to be blamed for what could be perceived to be a voter's pay cut.

Action under the CRA might also block further regulations under the FLSA. The CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law. Although the statute does not define what would constitute a rule that is "substantially the same" as a nullified rule, a repeal under the CRA might mean that the DOL loses its authority to raise the salary level under the FLSA ever again – unless and until the FLSA is amended by Congress.

Finally, if Congress does not repeal the regulation under the CRA, the newly configured DOL under the Trump Administration could issue a revised regulation, setting a new minimum salary level somewhere between the current level and the higher level. With the preliminary injunction in place, there is time for the Trump Administration to go through a new notice and comment period, as required under the Administrative Procedures Act. There may be bipartisan support for this – because many Democrats and Republicans agree that the current minimum salary level of $23,660 annually is too low, as it falls below the federal poverty level for a family of four. And a more moderate increase might pass muster under the district court's reasoning by not "supplanting" the duties test, while also eliciting less opposition from employers.

For now, employers that planned to implement compensation changes under the new regulations may decide to proceed with those compensation changes on a voluntary basis, especially if they have already communicated the upcoming changes to their employees. Others may wish to adopt a watch-and-wait approach. In any event, employers now have a reprieve from the mandatory compensation changes of the new overtime regulations.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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